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Penalizing the Poor: Durational Residency Requirements for Welfare Benefits

David A. Donahue

PENALIZING THE POOR: DURATIONAL RESIDENCY REQUIREMENTS FOR WELFARE BENEFITS

INTRODUCTION

Nearly thirty years ago, in *Shapiro v. Thompson*,[1] the Supreme Court held that statutes imposing one-year durational residency requirements for payment of Aid to Families with Dependent Children ("AFDC") benefits were unconstitutional denials of equal protection. The Court based its decision on the premise that such durational residency requirements "penalized" the welfare recipients' fundamental right to interstate migration, thus triggering strict scrutiny.[2] In the wake of *Shapiro*, Justices have grappled with the source of the right to interstate migration and the contours of the Court's "penalty" analysis. Critics have alleged that *Shapiro* "establish[ed] a basis for increased judicial activism."[3] Courts have described the right to travel doctrine that has sprung forth from *Shapiro* as "an area of jurisprudence that is unsettled and clearly in need of clarification by the United States Supreme Court."[4] Indeed, the Supreme Court will likely have the occasion to revisit *Shapiro* in the near future because of a resurgence of state durational residency requirements for welfare benefits.

In 1996, with the support of President Clinton, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[5] PRWORA decentralized welfare and gave the states greater leeway to experiment with benefit packages through the use of federal block grants. Critics

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[1] 394 U.S. 618 (1969).

[2] *See id.* at 634. The court characterized the strict scrutiny analysis as "necessary to promote a *compelling* governmental interest." *Id.*

[3] *The Supreme Court, 1968 Term—Recent Decisions: Equal Protection, State Residence Requirements for Welfare Recipients*, 83 HARV. L. REV. 7, 120 (1969) [hereinafter "*Welfare Recipients*"].

[4] Maldonado v. Houstoun, 177 F.R.D. 311, 323 (E.D. Pa. 1997).

[5] Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 742 U.S.C. §§ 7, 8, 21, 25, 42).

of PRWORA anticipate a "race to the bottom"[6] as states design less attractive benefits packages in order to prevent their state from becoming a "welfare magnet."[7] Proponents of PRWORA assert that states can avert the race to the bottom by enacting multi-tiered durational residency requirements to discourage migrant welfare recipients from settling in a given state.[8] Although several states had already enacted such requirements prior to PRWORA,[9] the Act has prompted a resurgence in the use of durational residency requirements to deter indigent migration. As state and federal courts consider challenges to the constitutionality of these provisions, the legal and philosophical underpinnings of *Shapiro* move closer toward Supreme Court review.

This Note will examine how courts have applied *Shapiro v. Thompson* thus far in the era of welfare reform cases and will propose how *Shapiro* should have been applied in those cases. Part I will discuss *Shapiro* and its progeny. Part II will briefly address the sources of the right to interstate migration. Part III will describe the new welfare legislation. Part IV will examine how modern courts have applied *Shapiro* to a variety of durational residency requirements that restrict welfare benefits. This Note concludes that the Supreme Court should rule that

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[6] *See, e.g.*, Peter Edelman, *The Worst Thing Bill Clinton Had Done*, ATLANTIC MONTHLY, Mar. 1997, at 43 (criticizing the Act and predicating that states "will try to make their benefit structures less, not more, attractive").

[7] *See, e.g.*, Paul E. Peterson, *Devolution's Price*, 14 YALE J. ON REG. 111, 116-18 (1996) [hereinafter *"Devolution"*] ("States whose welfare benefits are relatively high have become welfare magnets—places that attract poor people because they offer higher cash benefits than other states.").

[8] *See, e.g.*, F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race For The Top*, 5 SUP. CT. ECON. REV. 141, 177 (1997) (arguing that a two-tier residency plan "reasonably reduces welfare incentives to migration"); Todd Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 VAL. U. L. REV. 893, 894 (1997) (asserting that the "race to the bottom . . . will only worsen as Congress devolves power to the states").

A durational residency requirement is multi-tiered if it calculates a new resident's benefits based on the amount of benefits the applicant received from their former state residence. Thus, assuming every state pays a different level of welfare benefits, and groups of residents from every other state migrate to State *X*, State *X* could conceivably have fifty distinct "tiers" of welfare beneficiaries. *See Maldonado*, 177 F.R.D. at 316.

[9] *See generally* Clark Allen Peterson, Comment, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305, 336-39 (1993) (noting resurgence of durational residency requirements in the late 1980's to the early 1990's).

multi-tier durational residency requirements, permissible under PRWORA, are unconstitutional denials of equal protection.

I. RIGHT TO TRAVEL JURISPRUDENCE

A. *The* Shapiro *Trilogy: Strict Scrutiny of The Fundamental Right to Travel*

1. *Shapiro v. Thompson*

In *Shapiro*, the Court affirmed three district court decisions holding unconstitutional state or District of Columbia statutes that denied AFDC benefits to new residents based on failure to meet durational residency requirements.[10] The statutes at issue completely denied AFDC benefits to certain residents who did not reside in the state or District of Columbia for at least one year immediately preceding their applications for assistance.[11]

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[10] Shapiro v. Thompson, 394 U.S. 618, 621-22 (1969).

[11] *See id.* at 622. The Connecticut statute provided:

> When any person comes into this state without visible means of support for the immediate future and applies for aid to dependent children under chapter 301 or general assistance under part I of chapter 308 within one year from his arrival, such person shall be eligible only for temporary aid or care until arrangements are made for his return, provided ineligibility for aid to dependent children shall not continue beyond the maximum federal residence requirement.

Id. at 624 n.2 (quoting CONN. GEN. STAT. REV. § 17-2c (1967) (repealed 1969). There was an exception to the residency requirement for those entering the state with a "bona fide job offer or [who] are self-supporting upon arrival... and for three months thereafter." *Shapiro*, 394 U.S. at 622 n.2 (citing CONN. WELFARE MANUEL, c. II §§ 219.1-219.2 (1966)).

> The District of Columbia statute provided:
> Public assistance shall be awarded to or on behalf of any needy individual who either (a) has resided in the District for one year immediately preceding the date of filing his application for such assistance; or (b) who was born within one year immediately preceding the application for such aid, if the parent or other relative with whom the child is living has resided in the District for one year immediately preceding the birth; or (c) is otherwise within one of the categories of public assistance established by this chapter.

Id. at 624 n.3 (quoting D.C. CODE ANN. § 3-203 (1967) (repealed 1969)).

> The Pennsylvania statute provided:
> Assistance may be granted only to or in behalf of a person residing in Pennsylvania who (i) has resided therein for at least one year immediately preceding the date of application; (ii) last resided in a state which, by law, regulation or reciprocal agreement with Pennsylvania, grants public assistance to or in behalf of a person who has resided in such state for less than one year; (iii) is a married woman residing with a husband who meets the

The Court held that by creating "two classes of needy resident families indistinguishable from each other" other than their respective periods of residency in the jurisdiction, the statutes created "classification[s] which constitute[d] . . . invidious discrimination denying [the applicants] equal protection of the laws."[12] The Court held that because the durational residency requirement "touche[d] on the fundamental right of interstate movement, its constitutionality must be judged by [strict scrutiny]."[13]

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requirement prescribed in subclause (i) or (ii) of this clause; or (iv) is a child less than one year of age whose parent, or relative with whom he is residing, meets the requirement prescribed in subclause (i), (ii) or (iii) of this clause or resided in Pennsylvania for at least one year immediately preceding the child's birth. Needy persons who do not meet any of the requirements stated in this clause and who are transients or without residence in any state, may be granted assistance in accordance with rules, regulations, and standards established by the department.

Id. at 626 n.5 (quoting 62 PA. CONS. STAT. § 432(6) (1968) (repealed 1969)).

[12] *Shapiro*, 394 U.S. at 627.

[13] *Id.* at 638. In his dissenting opinion, Justice Harlan expressed particular disfavor with the following proposition: "I think this branch of the 'compelling interest' doctrine particularly unfortunate and unnecessary. It is unfortunate because it creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights." *Id.* at 661 (Harlan, J., dissenting); *see also* Thomas R. McCoy, *Recent Equal Protection Decisions: Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 1000-02 (1975) (using hypotheticals to show the potential expansion of *Shapiro*); Zubler, *supra* note 8, at 899-901 (asserting that Harlan's dissent identifies a major flaw in *Shapiro*: the lack of guidance as to what constitutes a penalty).

Shapiro was not the first case to employ the fundamental rights strand of equal protection. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (fundamental right of access to courts); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (fundamental right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (fundamental right to criminal appeals). *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 9 (1972) (listing the interests identified as "fundamental" during the Supreme Court's term and hypothosizing as to new frontiers for this classification). This strand of equal protection differs from the normal application of the clause because it focuses on the right being deprived rather than the class of persons being discriminated against. *See id.* at 10. Although commentators felt that the Court would expand its fundamental rights approach to include the basic necessities of life and education, such expectations failed. *See, e.g.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 137 (1973) (holding there is no fundamental right to an education); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (stating that there is no fundamental right to a minimum level of housing); Dandridge v. Williams, 397 U.S. 471, 484 (1970) (holding that there is no fundamental right to a minimum of welfare benefits). For a rare modern application of the fundamental rights strand of equal protection, see *M.L.B. v. S.L.J.*, 517 U.S. 1118 (1996) (applying a fundamental right of access to courts, equal protection analysis to require the state to provide a court transcript to an indigent mother in a parental rights termination proceeding).

Justice Brennan, writing for the majority, emphasized that the Court had long recognized the right to travel as a right " 'fundamental to the concept of our Federal Union.' "[14] Although the Court explicitly specified that it had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision,"[15] the Court cited several cases in which it had attributed the right to various constitutional provisions.[16] The Court then applied strict scrutiny, explaining that any classification that serves to penalize the constitutional right to interstate migration is unconstitutional unless it is "shown to be necessary to promote a *compelling* governmental interest."[17] The Court found that all of the states' asserted interests were either constitutionally impermissible or not compelling enough to withstand strict scrutiny. Notably, the Court held that the legislative purposes of "deterrence of indigents from migrating to the State [and] limitation of welfare benefits to those regarded as contributing [tax money] to the State" were not "constitutionally permissible state objective(s)."[18] Thus, such objectives would not be constitutional under any circumstances, notwithstanding the level of scrutiny applied by the Court. The Court also held that the states' asserted interest in encouraging new residents to join

[14] Shapiro, 394 U.S. at 630 (quoting United States v. Guest, 383 U.S. 745, 757 (1966)).

[15] *Id.* at 630.

[16] *See id.* at 630 n.8 (citing cases basing the right to travel on the Privileges and Immunities Clause (also known as the Comity Clause)).

It is important to note that the Court failed to distinguish between the right to travel and the right to interstate migration. Although often discussed in tandem, the two rights have different applications: the former encompassing the right to leave one state to establish residence in another, and the latter encompassing the right to travel into and through another state with no intention of establishing permanent residence. *See* Zubler, *supra* note 8, at 896. Courts and commentators alike have asserted that Justice Brennan's failure to distinguish these rights has contributed to the doctrinal uncertainty surrounding *Shapiro*. *See* Maldonado v. Houstoun, 177 F.R.D. 311, 324 n.12 (E.D. Pa. 1997) ("[T]he Supreme Court, in *Shapiro*, made no distinction between the right to travel and the right to interstate migration, despite the fact that these two rights are not identical."); Zubler, *supra* note 8, at 896.

[17] *Shapiro*, 394 U.S. at 634 (citations omitted). Scholars have criticized the Court for applying the fundamental rights strand of Equal Protection doctrine instead of substantive due process analysis once it determined that the statutes burdened a fundamental right. *See, e.g.*, Zubler, *supra* note 8, at 896-900.

[18] *Shapiro*, 394 U.S. at 633. The Court held that the states' interests in facilitating the planning of their welfare budgets, determining bona fide residence in their jurisdictions, and preventing fraudulent claims did not pass strict scrutiny. *See id.* at 634-38.

the work force was not even rationally related to the imposition of a one-year residency requirement for welfare benefits.[19] Although the Court made this determination under heightened review, its broad language suggests that this objective cannot justify a durational residency requirement for welfare benefits under any level of scrutiny.

2. *Dunn v. Blumstein*

The Court had occasion to revisit durational residency requirements in a different context in *Dunn v. Blumstein*.[20] In *Dunn*, the Court affirmed a district court decision invalidating durational residency requirements imposed as prerequisites for registration to vote in Tennessee.[21] The Court based its application of strict scrutiny on two grounds: (1) that the Tennessee statute deprived the migrant residents of their right to vote,[22] and (2) that the durational residency requirement "directly impinge[d]" upon the migrant residents' fundamental right to travel.[23] The Court found that although Tennessee's asserted interests of "insur[ing] purity of [the] ballot box" and providing surety that those voting would be "knowledgeable voter[s]"[24] were not unconstitutional per se, the statute in question was neither narrowly tailored to those interests, nor necessary to further compelling state interests.[25]

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[19] *See id.* at 637-38.

[20] 405 U.S. 330 (1972).

[21] *Id.* at 332-33. The statutes in question limited voting rights in elections for members of the general assembly and other civil officers, and registration rights for general elections to those residents who had lived in the State of Tennessee for twelve months prior to their application for voter registration. *See id.* at 332 n.1 (citations omitted).

[22] See id. at 334-35.

[23] *Id.* at 338. The Court cited *Kramer v. Union Free School District*, 395 U.S. 621, 626-30 (1969), for the proposition that state statutes "distributing the franchise" are subject to strict scrutiny. *Dunn*, 405 U.S. at 337; *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (finding a "poll tax" violative of the Equal Protection Clause of the Fourteenth Amendment).

It is unclear why the Court chose to assert the arguably less established right to travel rationale as additional grounds for strict scrutiny, though the Court may have been motivated by Chief Justice Burger's dissenting opinion. *See Dunn*, 405 U.S. at 363-64 (Burger, C.J., dissenting) (asserting that "[i]t is no more a denial of equal protection for a State to require newcomers . . . [to wait] a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting").

[24] Dunn, 405 U.S. at 345.

[25] *See id.* at 360 (noting the tenuous relationship between the state's interest in

Dunn clarified the Court's *Shapiro* holding in one important manner. The *Dunn* Court rejected the state's claim that the durational residency requirements in question did not penalize the right to interstate migration because they were not likely to deter travel.[26] Thus, the Court found that durational residency requirements constituted penalties on the right to travel whether or not the statute in question actually deterred interstate travel.[27]

3. *Memorial Hospital v. Maricopa County*

The Court continued its assault on durational residency requirements in *Memorial Hospital v. Maricopa County*.[28] In *Maricopa*, the Court reversed the Arizona Supreme Court's holding that county hospitals could permissibly limit non-emergency medical care and hospitalization to those indigents who had resided in the county for one-year prior to seeking treatment.[29] The Court, following its rationale in *Shapiro* and *Dunn*, found that the durational residency requirement penalized the indigent resident's right to interstate travel.[30] Although the Court noted that *Shapiro* did not determine that all durational residency requirements were per se unconstitutional,[31] the Court failed to offer any guidance as to what level of interference with the right to interstate migration would constitute a penalty.[32] Instead, the Court held that, as in *Shapiro*, the durational residency requirement created an " 'invidious classification,' "

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having informed voters and a fixed durational residency requirement).

[26] *See The Supreme Court, 1971 Term—Recent Decisions: Equal Protection: Durational Residency Requirements for Voting*, 86 HARV. L. REV. 104, 113 (1972).

[27] *See Dunn*, 405 U.S. at 339-40.

[28] 415 U.S. 250 (1974).

[29] *Id.* at 252-53. Arizona law mandated that each county provide hospitalization and non-emergency care to their indigent sick. *See id.* at 252. To be eligible for free non-emergency medical care, however, the indigent must have been a resident of the county during the preceding twelve months. *See id.* (citations omitted).

[30] *See id.* at 256-62.

[31] *See id.* at 256-57 (citing *Shapiro*, 394 U.S. at 638 n.21).

[32] *See id.* at 284-85 (Rehnquist, J., dissenting). Unlike *Shapiro*, the Court recognized the difference between the right to travel and the right to interstate migration. *See id.* at 255 ("[T]he right to travel was involved in only a limited sense in *Shapiro*. The Court was there concerned only with the right to migrate, 'with intent to settle and abide' or, as the Court put it, 'to migrate, resettle, find a new job, and start a new life.' ") (citation omitted). Once again, however, the Court neglected to discuss whether the two rights have distinct origins and whether the Court's analysis applied to both rights.

which deprived newcomers to the state of " 'the basic necessities of life.' "[33] The Court rejected the State's assertion that *Shapiro* could be distinguished because while *Shapiro* involved a total denial of benefits, Arizona counties still provided some level of care to its indigent newcomers.[34] Thus, the Court implied that the challenged durational residency need not result in the complete denial of a benefit in order to constitute a penalty on the right to interstate migration.

Taken together, the *Shapiro* trilogy of cases establishes that strict scrutiny applies to any classification which serves to penalize the exercise of the right to interstate migration. At this point, the Court did not limit this analysis to cases in which there were deprivations of fundamental rights or the basic necessities of life. Other than providing these specific examples of what constitutes a penalty, the trilogy provides little guidance for future cases.

B. Starns, Sturgis, Martinez & Sosna: *Residency Requirements "of a Different Stripe"*

1. In-State Tuition cases: *Starns* and *Sturgis*

In *Starns v. Malkerson*[35] and *Sturgis v. Washington*,[36] the Court summarily affirmed district court opinions upholding the constitutionality of state statutes that restricted eligibility for reduced in-state higher education tuition fees to those students who had resided in the jurisdiction for one year.[37] In both cases, the lower courts distinguished *Shapiro* on the grounds that higher education is not "[a] basic necessit[y] of life."[38] The courts

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[33] *Id.* at 269.

[34] The Arizona statute's durational residency requirement did not apply to "emergency cases when immediate hospitalization or medical care is necessary for the preservation of life or limb." *Id.* at 252 n.2 (citing ARIZ. REV. STAT. ANN. § 11-297A (Supp. 1973-74)).

[35] 401 U.S. 985 (1971) (mem.).

[36] 414 U.S. 1057 (1973) (mem.).

[37] *See* Sturgis v. Washington, 368 F. Supp. 38 (W.D. Wash. 1973) (sustaining the Washington statute's one-year residency requirement to qualify for in-state tuition), *aff'd mem.*, 414 U.S. 1057 (1973); Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970) (sustaining the Minnesota Board of Regents residency requirement for in-state tuition), *aff'd mem.*, 401 U.S. 985 (1971).

[38] *See Sturgis*, 368 F. Supp. at 41; *Starns*, 326 F. Supp. at 238. The *Starns* court also distinguished *Shapiro* on grounds that the statute in *Shapiro* was specifically intended to discourage interstate migration, whereas there was neither evidence of

thus applied a rational basis review and found that the distinctions created by the statutes bore a rational relationship to a legitimate state interest.[39]

It is important to note that the Court has held that "summary affirmance . . . is not to be read as an adoption of the reasoning supporting the [lower court's] judgment under review."[40] Thus, while the Court affirmed the judgments in *Starns* and *Sturgis*, it did not necessarily agree with the rationale of the courts below. Indeed, although *Starns* explicitly stated that the primary purpose of Minnesota's durational residency requirement was "to achieve partial cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments and expenditures therein,"[41] the Court considered the durational residency requirement in *Starns* as a legitimate test for bona fide residency.[42]

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such intent, nor of such deterrence in the Minnesota Board of Regents decision. *Id.* at 237-38. The Court summarily affirmed this case prior to deciding *Dunn v. Blumstein* wherein the Court held that intent to deter and actual deterrence of the right to travel are not prerequisites for triggering strict scrutiny. *See* Dunn v. Blumstein, 405 U.S. 330, at 339-40; *supra* notes 20-27 and accompanying text.

The *Sturgis* court's attempt to distinguish higher education from the basic necessities of life implied that the court believed that the latter was a fundamental right. *See Sturgis*, 368 F. Supp. at 41 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)) The *Sturgis* Court concluded "that this [was] not a case of infringement of a fundamental right and therefore h[e]ld that the exacting standards of the compelling state interest test are not here applicable." *Id.* This conclusion, although perhaps implicit in the Shapiro decision, did not prove to be true. *See supra* note 13.

[39] *See Sturgis*, 368 F. Supp. at 41 (defining the issue as whether "there [is] a rational, reasonable, relevant distinction between the differentiated classes"); *Starns*, 326 F. Supp. at 240-41.

[40] Zobel v. Williams, 457 U.S. 55, 64 n.13 (1982); *see also* Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 920-21 (1976) (Brennan, J., dissenting) (asserting that a summary disposition is binding in a subsequent case only insofar as when the issue raised in the two cases are identical); Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) (explaining that summary affirmance denotes the agreement with the lower court's disposition of a case, but not necessarily with that court's reasoning); Edelman v. Jordan, 415 U.S. 651, 671 (1974) (noting that a judgment on the merits is entitled to greater precedential value than a summary affirmance).

[41] *Starns*, 326 F. Supp. at 240; *accord Sturgis*, 368 F. Supp. at 41 (asserting that the waiting period facilitates the implementation of a "partial cost equalization").

[42] *See Zobel*, 457 U.S. at 64 n.13 ("Moreover . . . we considered the Minnesota one-year residency requirement examined in *Starns* a test of bona fide residence, not a return on prior contributions to the commonweal[th]."); Vlandis v. Kline, 412 U.S. 441, 452-53 n.9 (1973) (distinguishing *Starns* on grounds that under the Min-

2. *Martinez v. Bynum*: Bona Fide Residency Requirements

The Court analyzed the constitutionality of a purported test for bona fide residency in *Martinez v. Bynum*.[43] *Martinez* concerned a Texas education law that denied free public school education to any "minor who lives apart from a 'parent, guardian or other person having lawful control of him under an order of a court' if his presence in the school district is 'for the primary purpose of attending the public free schools.' "[44] The Court applied a rational basis review to the statute and held that "bona fide residence requirement[s], appropriately defined and uniformly applied, further[] the substantial state interest in assuring that services provided for its residents are enjoyed only by residents."[45] The Court noted that such requirements "do[] not burden or penalize the constitutional right of interstate travel . . . [because] any person is free to move to a State and to establish residence there."[46]

The Court asserted that a residency requirement is appro-

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nesota statute, the durational residency requirement "was merely one element which Minnesota required to demonstrate bona fide domicile"). In *Vlandis*, the Court struck down a Connecticut statute that created an "irrebuttable presumption" that out-of-state students at Connecticut State Universities could not be considered state residents for purposes of paying lower in-state tuition. *Id.* at 454. The Court held that Connecticut's irrebuttable presumption that out-of-state resident attendees of the University would not establish permanent residency in Connecticut within four years violated the students' right to procedural due process. *See id.* at 454. Because the Court focused on procedural due process rather than equal protection, *Vlandis* does not add much to the *Shapiro* trilogy. It does, however, indicate that the Court viewed *Starns* as a bona fide residency case. For a discussion of the "brief and troubled life of 'irrebuttable presumptions,' " see generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 914-16 (13th ed. 1997) (discussing criticism of the irrebuttable presumptions mode of analysis and its ultimate fall from grace in Supreme Court jurisprudence) (internal citations omitted).

[43] 461 U.S. 321, 328 (1983).

[44] *Id.* at 323, 323 n.2 (citing TEX. EDUC. CODE ANN. § 21.031(a) (West 1997)).

[45] *Id.*at 328; *see also id.* at 346 (Marshall, J., dissenting) (claiming that Court held that where a statute "imposes a bona fide residence requirement in a uniform fashion, it is *ipso facto* constitutional").

The Court also asserted that because of the traditional importance of local control over schools, the state has an interest in insuring that only bona fide residents may attend tuition-free. *See id.* at 329-30 (citing Milliken v. Bradley, 418 U.S. 717, 741-42 (1973)). *But see id.* at 346 (Marshall, J., dissenting) (asserting that the right to education is fundamental and that because the statute in issue impeded this fundamental right, strict scrutiny should apply).

[46] *Id.* at 328-29.

priately defined if it requires those seeking residency "to live in the district with a bona fide intention of remaining there."[47] The Court held that the residency requirement in the Texas statute comported with these "traditional, basic residence criteria."[48]

3. *Sosna*: Ad Hoc Balancing or Non-Penalty Residency Requirements?

Sosna v. Iowa[49] was the first post-*Shapiro* case in which the Court issued an opinion upholding a durational residency requirement. In *Sosna*, the Court upheld an Iowa statute that required residents to fulfill a one-year residency requirement prior to seeking a divorce. Although the proper analysis under *Shapiro, Dunn,* and *Maricopa* would arguably have been to determine whether the durational residency requirement penalized the new resident's right to interstate travel by denying her the right to file for divorce,[50] the Court followed a different path. Justice Rehnquist, writing for the Court, proceeded to distinguish the Iowa statute from *Shapiro, Dunn*, and *Maricopa* on the grounds that the statute restricted the resident's ability to file for a divorce only temporarily, and was "justified on grounds other than purely budgetary considerations or administrative convenience."[51]

Although the Court did not apply the *Shapiro* analysis in traditional fashion, and critics have dismissed *Sosna* as an example of "*ad hoc* balancing,"[52] *Sosna* can be understood within the framework provided by *Shapiro, Dunn*, and *Maricopa*. Justice Rehnquist asserted that although the restriction on residents' benefits or rights in *Shapiro, Dunn,* and *Maricopa* lasted

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[47] *Id.* at 332.

[48] *Id.*

[49] 419 U.S. 393 (1975).

[50] *See id.* at 418-19 (Marshall, J., dissenting) (asserting that a classification which impinges upon the right to interstate travel must be supported by a compelling governmental interest in order to be valid).

[51] *Id.* at 406. Iowa asserted that the durational residency requirements were necessary because of the importance of the issues at stake (i.e. child support, property rights), to protect its interest in preventing itself from becoming a "divorce mill," and to provide a safeguard against collateral attack against its divorce decrees from other states. *See id.* at 406-09.

[52] *Id.* at 419 (Marshall, J., dissenting) (claiming that under the majority's approach, "the State's putative interest in ensuring that its divorce petitioners establish some roots in Iowa is said to justify the one-year residency requirement"); *see also* Zubler, *supra* note 8, at 905 ("*Sosna* is probably best viewed as *sui generis*.").

only temporarily, the benefits or rights forgone during the period of restriction were permanently lost.[53] In *Sosna*, as the Court states, the right to file for a divorce is only temporarily restricted; the resident's right to seek a divorce is completely restored once she has fulfilled the durational residency requirement.[54] Viewed in the context of *Shapiro's* penalty analysis, *Sosna* makes a distinction, albeit implicitly, that, in some circumstances, a temporary deprivation of a right may not rise to the level of a penalty.[55] Because the durational residency requirement in question does not constitute a penalty, rational basis is the appropriate standard.

When analyzed individually, the in-state tuition and divorce cases do not add much to the *Shapiro* trilogy. The in-state tuition cases lack precedential value and the Court has limited their scope. They are best viewed, along with *Martinez*, as examples of valid tests for bona fide residency. *Sosna* may or may not provide guidance as to what constitutes a penalty, or, as Justice Marshall feared, may signal the Court's reluctance to apply the *Shapiro* penalty rationale in durational residency requirement cases.[56]

When viewed as a group, however, this body of case law certainly suggests the Court's unwillingness to expand the *Shapiro* trilogy's penalty analysis. Though the Court has ruled that education is not a fundamental right, it has stated that it is an "important interest."[57] Thus, a test for bona fide residency is pre-

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[53] *See Sosna*, 419 U.S. at 406. To take the least obvious example, the resident in *Dunn* would be forced to forgo his right to vote in all elections during the one-year durational residency period. Although he would be able to vote in subsequent elections, he would not and could not regain his right to vote in the prior elections at the end of the one year period.

[54] *Id.* (stating that "Iowa's [divorce residency] requirement delayed [the appellant's] access to the courts, but, by fulfilling it, she could ultimately have obtained the same opportunity for adjudication which she asserts ought to have been hers at an earlier point in time").

[55] Admittedly, this analysis infers much from the scant language in Justice Rehnquist's opinion. However, the Court has yet to define any specific criteria for what constitutes a penalty, and has not decided any case concerning durational residency requirements since *Sosna*.

[56] *See Sosna*, 419 U.S. at 419 (Marshall, J., dissenting) ("I am concerned not only about the disposition of this case, but also about the implications of the majority's analysis . . . for durational residency requirement cases in general.").

[57] *See* Milliken v. Bradley, 418 U.S. 717, 778 (1974) (White, J., dissenting) (noting that there is an important interest in maintaining local autonomy over educational decisions); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30, 35 (1973) (observing that although education is not a fundamental right, it is an impor-

sumptively valid even where important interests are involved.

Moreover, the Court has never held that the right to divorce is a fundamental right. In *Boddie v. Connecticut*,[58] however, the Court recognized that divorce is closely related to marriage and procreation, which do merit a higher level of scrutiny.[59] Thus, it seems apparent that the Court will only apply its penalty analysis to durational residency requirements that hinder fundamental rights or the basic necessities of life.

C. *The Rehnquist Court Applies the Brakes to Right to Travel Analysis in* Zobel, Hooper, & Soto-Lopez

1. *Zobel v. Williams*

In *Zobel v. Williams*,[60] the Court held unconstitutional an Alaska statutory scheme that distributed income from its petroleum reserves to its citizens in varying amounts based on each citizen's period of residence within the state.[61] The Court noted

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tant one, which is vital to free society) (citing Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (stating that "education is perhaps the most important function of state and local governments").

[58] 401 U.S. 371 (1971).

[59] *See id.* at 374 (holding that because of the importance of marriage in "society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying . . . access to its courts to individuals who seek judicial dissolution of their marriage"); *see also* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (finding that the fundamental right of economically poor people to marry can be statutorily impinged upon, if the statute effectuates only sufficiently important state interests); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating a statute prohibiting married people from using contraceptives pursuant to a fundamental rights/strict scrutiny analysis); Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding a Virginia anti-miscegenation statute unconstitutional due to its failure to satisfy the " 'most rigid scrutiny' " under the Fourteenth Amendment) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that "strict scrutiny of the classification which a state makes in a sterilization law is essential, lest . . . invidious discriminations are made . . . in violation of the constitutional guaranty of just and equal laws").

[60] 457 U.S. 55 (1982).

[61] *See id.* at 56. The statute divided Alaska's petroleum reserve fund into units of $50. Each resident would get annual payment composed of one unit per year for each year that they lived in the state. Thus, a ten year resident would get $500 per year, whereas a two year resident would only get $100 per year. *See id.* at 57.

The Court confronted a similar situation and reached similar results on different grounds in the context of a state tax use law. *See* Williams v. Vermont, 472 U.S. 14 (1985). In *Williams*, the Court held that it was unconstitutional for a state to grant its residents a tax credit for sales tax paid in a different state when purchasing of a car there, but denying that same benefit to similarly situated non-residents.

that, like *Shapiro*, the Alaska statutory scheme "involve[d] distinctions between residents based on when they arrived in the [s]tate."[62] The Court distinguished Alaska's scheme from the *Shapiro* line of cases, however, by noting that the statutory scheme "creates fixed, permanent distinctions between . . . classes of concededly bona fide residents, based on how long they have been in the [s]tate."[63] Presumably because of this distinction, the Court did not consider whether the scheme constituted a penalty on the right to travel, subject to strict scrutiny under *Shapiro*.[64] Instead, the Court held that the scheme failed to pass even rational basis review.[65]

Alaska asserted three objectives in support of the classification scheme. The Court held that the first two objectives, "creating a financial incentive for individuals to establish and maintain Alaska residence, and assuring prudent management of the [petroleum reserves] [f]und" were not rationally related to the distinctions the scheme created between older and newer residents of the state.[66] The Court's analysis of these two objectives, however, did not comport with traditional rational basis equal protection review.[67] Instead of according deference to the state's purported objectives, the Court scrutinized the fit between the state's interests and the classification it created. Thus, although the Court purported to apply rational basis review, its standard is more akin to rational basis with a bite.[68]

Id. at 28. The argument that the statute unlawfully impinged upon the right to travel was not reached. *See id.* at 27. Instead, the case was resolved on the grounds that the statute was facially discriminatory. *See id.* at 28.

[62] *Zobel*, 457 U.S. at 60 n.6.

[63] *Id.* at 59.

[64] *See id.* at 60 n.6. The Court noted "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.*

[65] *See id.* at 65 (concluding that "Alaska has shown no valid state interests which are rationally served by the distinction it makes between citizens" based on when the citizen established residency in Alaska).

[66] *Id.* at 61.

[67] *See id.* at 82 (Rehnquist, J., dissenting) (noting that the Court seems to depart from the "highly deferential approach" it usually takes towards economic regulations); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1707 n.80 (1984) ("[I]n rationality review under the equal protection clause . . . the examination of whether a rational basis exists for a classification serves largely as a check on illegitimate motivations; . . . the test is deferential because it is adopted when there is no reason to suspect that an illegitimate motivation is at work.") (internal citations omitted).

[68] *See* Sunstein, *supra* note 67, at 1713 n.117 (citing *Zobel* as "one of the few cases in which the Court has invalidated a statute on rationality grounds"); *cf.*

The Court, citing *Shapiro*, declared unconstitutional Alaska's third stated objective, to "reward citizens for past contributions."[69] Thus, according to the broad language of the Court, this objective is under no circumstances "a legitimate state purpose."[70] Justice O'Connor, concurring, and Justice Rehnquist, dissenting, took extreme exception to this viewpoint.[71]

The four opinions in *Zobel* provide clear evidence of the Court's fractured view of right to travel cases. Justice Brennan concurred, but would have decided the cases in the same fashion as *Shapiro*, *Dunn*, and *Maricopa*—a classification "where the 'right to travel' [was] involved . . . [thereby] trigger[ing] intensified equal protection scrutiny."[72] He also reiterated his belief that the Court need not ground the right to travel in any specific constitutional provision.[73] Justice O'Connor also concurred in the judgment, but would have "measure[d] Alaska's scheme against the principles . . . [of] the Privileges and Immunities [(or Comity)] Clause."[74] Finally, Justice Rehnquist dissented, agreeing with the majority that rational basis was the appropriate standard of review, but disagreeing with the Court's modified application of that standard.[75]

2. *Hooper v. Bernadillo County Assessor*

In *Hooper*,[76] the Court declared unconstitutional a New

Romer v. Evans, 517 U.S. 620, 633-35 (1996) (purporting to apply a rational basis review to a classification scheme, yet striking down Colorado referendum).

[69] *Zobel*, 457 U.S. at 63-64 (raising the concern that "Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency").

[70] *Id.* at 63 (citing Vlandis v. Kline, 412 U.S. 441, 449-50, 450 n.6 (1973); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969)).

[71] *See id.*. at 73 (O'Connor, J., concurring) (asserting that the Equal Protection Clause does not render this purpose impermissible); *see also id* at 83 (Rehnquist, J., dissenting) (claiming that Court has only found this interest impermissible when applying strict scrutiny in travel cases).

[72] *Id.* at 66 n.1 (Brennan, J., concurring). Brennan asserted that the "right [to travel]–or, more precisely, the federal interest in free interstate migration–is clearly, though indirectly, affected by the Alaska dividend-distribution law, and this threat to free interstate migration provides an independent rationale for holding that law unconstitutional". *Id.* at 66.

[73] *See id.* at 67 (Brennan, J., concurring) (arguing that such a statutory scheme as that adopted by Alaska is "inconsistent with the federal structure even in its prospective operation") (citing *Shapiro*, 394 U.S. at 630).

[74] *Id.* at 73-74 (O'Connor, J., concurring).

[75] *See id.* at 82-83 (Rehnquist, J., dissenting).

[76] 472 U.S. 612 (1985).

Mexico statute that provided annual property tax exemptions to any resident Vietnam War veteran who had resided in the State prior to May 8, 1976.[77] The Court applied rational basis (with a bite) as the standard of review and held that the statute's stated objectives were not rationally related to any legitimate government purpose.[78] Once again, the Court decided to forgo a *Shapiro* fundamental right to travel equal protection analysis. The Court clarified its rationale for doing so by distinguishing between right to travel cases, which " 'examine[], in equal protection terms, state distinctions between newcomers and longer term residents,' "[79] and cases like *Zobel* and *Hooper* which do not invoke the right to travel, but examine, in equal protection terms, permanent, fixed " 'distinction[s] between residents based on when they first established residence in the State.' "[80] Thus, it seemed after *Zobel* and *Hooper* that the Court would only apply the *Shapiro* penalty analysis in cases involving durational residency requirements in which the state creates temporary distinctions between newer and older residents.

3. *Attorney General of New York v. Soto-Lopez*

In *Soto-Lopez*[81] the Court failed to follow the rationale of *Zobel* and *Hooper*. *Soto-Lopez* involved a New York statutory scheme which provided civil service employment preferences to honorably discharged United States army veterans who were New York residents when they entered military service.[82] Although a majority of the Court voted to strike the statute down, there was no consensus as to the appropriate standard of review.

Justice Brennan's plurality opinion applied the *Shapiro* penalty analysis.[83] The Court emphasized that although the benefits, namely civil service employment preference bonus points, "may not rise to the same level of importance as the ne-

[77] *See id.* at 614, 616.

[78] *See id.* at 621-23 (citing *Zobel*, 457 U.S. at 63).

[79] *Id.* at 618 n.6 (quoting *Zobel*, 457 U.S. at 60 n.6).

[80] *Id.* (following *Zobel* in applying an equal protection analysis).

[81] 476 U.S. 898 (1986) (plurality).

[82] *Id.* at 900. Those residents who were New York residents when they joined military service were awarded "bonus points," which were added to their civil service test scores. *See id.* Thus, like the classifications in *Zobel* and *Hooper*, the classification between residents was fixed and permanent. *See id.*

[83] *See id.* at 910 (stating that New York could accomplish its goal by allowing special credits to all qualified veterans, rather than requiring a prior residence requirement).

cessities of life and the right to vote," such benefits were significant.[84] Because the statute operated to permanently deprive some residents of these significant benefits, "based only on the fact of nonresidence at a past point in time," the plurality concluded it constituted a penalty on the right to interstate migration.[85] The plurality then found that New York failed to meet "its heavy burden of proving that it ha[d] selected a means of pursuing a compelling state interest which does not impinge unnecessarily on" the right to interstate migration.[86]

Chief Justice Burger concurred in the result, but asserted that the Court, under *Zobel* and *Hooper*, should have first determined whether the statute passed rational basis review before it addressed whether the statute penalized the right to interstate migration.[87] He argued that the New York statutory scheme was very similar to the scheme the Court struck down in *Hooper*, and proceeded to apply a similar analysis with analogous results.[88]

Justice O'Connor dissented and again asserted that the Comity Clause should have governed the case at bar.[89] She further argued that whether the Court applied *Shapiro*'s right to migrate penalty analysis, the rational basis review of *Zobel* and *Hooper*, or the Comity Clause, the case did not warrant heightened scrutiny because public employment is not a significant enough interest.[90]

Although the plurality opinion garnered the most votes with four, it is highly questionable whether the Court will apply the *Shapiro* penalty analysis to similar cases in the future. A majority of the Justices favored some form of review other than the

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[84] *Id.* at 908 (suggesting that although the issue of bonus points does not rise to the level of strict scrutiny, it does necessitate a heightened standard of review).

[85] *Id.* at 909 (noting that the veterans who failed to qualify under the statute are "permanently" deprived of credits).

[86] *Id.* at 911. The plurality stated that a state may not discriminate against a resident solely on the basis of when they arrived in the state. *See id.* (citing *Hooper*, 472 U.S. at 623).

[87] *See id.* at 912-13 (Burger, C.J., concurring) (stating that the analysis ends once a statute fails the rationality test).

[88] *See id.* Justice White joined Chief Justice Burger's concurrence and opined that the right to travel was not sufficiently implicated to require heightened scrutiny. *See id.* at 916.

[89] *See id.* at 918 (O'Connor, J., dissenting). Justice Stevens joined Justice O'Connor's dissent and filed a brief dissent of his own. *See id.* at 916 (Stevens, J., dissenting). Justice Rehnquist joined Justice O'Connor's dissent. *See id.* at 918.

[90] *See id.* at 925 (stating that the issue of public employment has a minimal effect, and something more is needed to trigger heightened scrutiny).

penalty analysis, and none of the plurality Justices remain on the Court.[91] Therefore, a safer assumption is that the Court will apply the right to travel penalty analysis only in cases where residency distinctions affect a fundamental right, such as access to the ballot, or the basic necessities of life. In all other cases involving permanent class distinctions between newer and older residents based on the duration of residence within the state, it is likely that the Court will not implicate the right to travel, and thus, apply some form of rational basis scrutiny. Of course, there is also the question of whether the present Court will seek to establish a constitutional basis for the fundamental right to travel.

II. THE CONSTITUTIONAL GROUNDS FOR THE RIGHT TO INTERSTATE MIGRATION[92]

A. *Justice Brennan's Structural Approach*

The failure to ground the fundamental right to travel in a specific constitutional provision, or set of provisions, has been a major criticism of the *Shapiro* line of cases.[93] In *Shapiro*, Justice Brennan wrote "[w]e have no occasion to ascribe the source of this right . . . to a particular constitutional provision."[94] Brennan

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[91] *See* William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMMENTARY 73 (1994) (describing the potential impact new Supreme Court Justices will have on the right to travel issue). Professor Cohen notes that the only three Justices–White, Brennan and Marshall–who were in the majority in all cases striking down discrimination cases, no longer sit on the Court. *See id.* at 78. Chief Justice Rehnquist has always voted to uphold state regulations, three other Justices have "dissented in one, two, or all three of the most recent cases," and Justices Kennedy, Thomas, Scalia, Ginsburg, and Souter have not participated in any Supreme Court decisions touching upon the issue of discrimination against new citizens. *Id.* at 77-78 (footnote omitted). Since Professor Cohen's article, Justice Breyer has replaced Justice Blackmun, who was the in the majority in two of the three cases.

[92] The subject of the constitutional grounds for the right to travel is vast enough to warrant an entire paper, or perhaps a book. Although the source of the right is somewhat outside of the scope of this paper, in recognition of the current Court's apparent fetish with textual interpretation, this paper will merely sketch out the major constitutional provisions that members of the Court and constitutional scholars have asserted as grounds for the right to travel.

[93] *See e.g.*, Zubler, *supra* note 8, at 895-901 (discussing a need for clarification and correction in right to travel jurisprudence).

[94] Shapiro v. Thompson, 394 U.S. 618, 630 (1969); *see also* United States v. Guest, 383 U.S. 745, 757-758 (1966) (stating that the right to travel is fundamental to our federal system and has been recognized numerous times).

later opined that "the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary."[95] Ultimately, however, Justice Brennan seemed to believe that the very structure and purpose of the Constitution itself formed the basis for the right. He found "its unmistakable essence in that document that transformed a loose confederation of States into one Nation."[96] Thus, he believed that the right is fundamental to the document that created our nation.

B. Justice O'Connor's Approach: The Comity Clause

Justice O'Connor has repeatedly asserted her belief that the right to travel is grounded in Article Four's Privileges and Immunities Clause,[97] also known as the Comity Clause.[98] At least one active member of the Court has expressly rejected O'Connor's approach.[99] The main criticism of finding the source of the right to travel in the Comity Clause is that the Clause applies only to the right to travel, but not the right to interstate migration.[100] Thus, the Clause protects a citizen of State *A* from being denied rights by State *B*, but does nothing for Citizen *A* when it is State *A* that denies him rights.[101] Justice O'Connor rejected this criticism, however, implying that it was merely a technical distinction.[102]

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[95] *Zobel*, 457 U.S. at 66 (Brennan, J., concurring).

[96] *Id.* at 67. Justice Brennan went on to state that with the adoption of the Equal Protection Clause, discrimination based upon length of residency was implicitly rejected. *See id.* at 71.

[97] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[98] *See Soto-Lopez*, 476 U.S. at 918-25 (O'Connor, J., dissenting); *Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring). *See generally* Raoul Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L. J. 853, 863 (1981) (asserting the Comity Clause as a textual source of the right to travel).

[99] *See Zobel*, 457 U.S. at 84 (Rehnquist, J., dissenting) (stating that the clause is for the benefit of nonresidents, and has no application by a citizen who questions his resident state's laws).

[100] *See id.* (opining that the Privilege and Immunity Clause is not a provision whereby the federal government may regulate the way in which the states controlled their citizens).

[101] *See id.* at 84 n.3 (concluding that the "[c]lause assures that *nonresidents* of a State shall enjoy the same privileges and immunities as residents enjoy").

[102] *See id.* at 75 (O'Connor, J., concurring) (explaining that a scheme which treats a citizen who moves to state *A* differently from a citizen who already resides there violates the clause) (citing Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Arti-*

C. *The Fourteenth Amendment*

1. The Privileges and Immunities Clause

The Fourteenth Amendment Privileges and Immunities Clause states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[103] Although judges and commentators have asserted this clause as a source of the right to travel and the right to interstate migration,[104] the *Slaughter-House Cases*[105] basically eviscerated this clause by holding that it only protected citizens from state interference with the privileges or immunities of national citizenship.[106]

2. The Citizenship Clause

The Citizenship Clause provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[107] In his concurring opinion in *Zobel*, Justice Brennan argued that the "[Citizenship] Clause does not provide for, and does not allow for, degrees of citizenship based

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cle IV, 92 HARV. L. REV. 1461, 1464-65 n.17 (1979)). Justice O'Connor has articulated her approach as follows: First the Court should determine whether the state is engaging in discrimination that burdens an " 'essential activity or [the] exercise [of] a basic right' " of the non-resident. *Id.* at 76 (quoting Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 387 (1978)). If so, the state action will only be valid if the state proves that the non-citizens constitute a " 'peculiar source of the evil' " at which the discriminatory statute is aimed, and whether the statute bears a " 'substantial relationship' between the evil and the discrimination practiced against the noncitizens." *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring) (quoting Hicklin v. Orbek, 437 U.S. 518, 525-27 (1978)).

[103] U.S. CONST. amend. XIV, § 1, cl. 2.

[104] *See* Edwards v. California, 314 U.S. 160, 181, 182-85 (1941) (Douglas and Jackson, JJ., concurring) (stating that the right to migration is grounded in the Comity Clause); Twining v. New Jersey, 211 U.S. 78, 97 (1908) (noting that the right to interstate travel is one of the privileges of national citizenship). *See generally* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (discussing the applicability of the Privileges and Immunities Clause and the distinction between substantive and equity-based constitutional limitations).

[105] 83 U.S. (16 Wall.) 36 (1872).

[106] *See* Zubler, *supra* note 8, at 917 (suggesting that although the *Slaughter-House Cases* may have been wrongly decided, such a longstanding precedent is unlikely to be overruled).

[107] U.S. CONST. amend. XIV, §1, cl. 1.

on length of residence."[108] Other scholars have interpreted this clause to mean that "it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide."[109]

3. The Equal Protection Clause: Newcomers as a Suspect Class

Some commentators have argued that newcomers should be considered a suspect class and that strict scrutiny should apply to class distinctions based on duration of residency.[110] This view arguably finds some support in the heightened rational basis review of *Zobel* and *Hooper*. However, newcomers, as a class, fail to meet the traditional criteria for identification as a suspect class.[111] Although they are typically a minority, they are by no means "discrete and insular."[112] It may be argued, however, that newcomers, by virtue of their lack of presence in the jurisdiction, are shut out of the political processes that would otherwise tend to protect them from discrimination.[113]

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[108] *Zobel*, 457 U.S. at 69, 69 n.2 (implying that the contrary view would be consistent with aristocracy); *see* Richard Rutland, *Virginia Declaration of Rights* (1776), *in* THE BIRTH OF THE BILL OF RIGHTS, app. A (1955) (stating that a citizen is not entitled to exclusive or separate privileges).

[109] William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMMENTARY, 73, 79 (1994) (concluding that it would also be unconstitutional to treat citizens as state residents in theory but not in practice).

[110] *See generally* Thomas R. McCoy, *Recent Equal Protection Decisions - Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 1016-23 (1975). McCoy argues that even though the Fourteenth Amendment was designed to protect black citizens, the Supreme Court has applied a broad interpretation of the amendment and created a suspect class whenever the disadvantaged class "occupies the same position with respect to state government as that occupied by blacks". *Id.* at 1017.

[111] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[112] *Id.*

[113] *See id.* Although the newcomers presumably had the ability to vote in their state of origin, they do not have the ability to participate in the political processes that deny them the right asserted, by virtue of their absence in the state at the time of enactment of the durational residency requirement.

Suspect class equal protection analysis would only provide constitutional guidance for durational residency requirement right to travel cases. In *Zobel*, *Hooper*, and *Soto-Lopez*, the class distinctions were based on residents' duration or timing of residency within the state, rather than recent migration into the state. For instance, in *Zobel* a resident of twenty years within the state received a greater share of the petroleum reserve fund than a resident of ten years. Certainly the ten year resident could not be considered a newcomer for equal protection purposes.

III. WELFARE REFORM & THE MULTI-TIERED DURATIONAL RESIDENCY REQUIREMENT

A. *AFDC: Welfare as we Knew It*

Congress established the Aid to Families with Dependent Children Program as part of the Social Security Act of 1935 ("AFDC").[114] AFDC guaranteed a minimum level of assistance in the form of an "entitlement" to families with children who met statutorily defined criteria.[115] The program also entailed a matching federal grant–as states increased AFDC benefits for families, the government increased its payment to the states.[116] The state programs had to be submitted to the Secretary of Health and Human Services for approval,[117] but federal supervision was minimal.[118] The old statute implicitly permitted durational residency requirements,[119] but expressly prohibited durational residency requirements in excess of one year.[120]

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[114] *See* Zubler, *supra* note 8, at 926. The AFDC was established as an optional monetary supplement to individual state programs that had residency requirements which made it difficult for newcomers to qualify for aid. *See id.* Under the AFDC, the federal government allowed states to continue to deny newcomers benefits for one year. *See id.*

[115] *See* Edelman, *supra* note 6, at 44-45 (recognizing that, although helpful, AFDC benefits do not lift a family from poverty even when such benefits are coupled with food stamps).

[116] *See id.* (noting, however, that the states choose the income qualification levels); Zubler, *supra* note 8, at 926-27 (pointing out that it is the states that that set the benefit amounts). Although the AFDC program refers to a "matching" federal grant, in fact the amount of matching varied inversely to state per capita income. *See id.* at 927. Thus, in poorer states, the federal government paid a higher percentage of the benefits. *See id.* For example, in 1995, the federal government contributed over seventy-eight percent of the AFDC benefits paid out in Mississippi, but only fifty percent of those in New York. *See id.*

[117] *See* Shapiro v. Thompson, 394 U.S. 618, 638-39 (1969) (quoting the requirements set out in section 402(b) of the Social Security Act of 1935 (codified at 42 U.S.C. § 602(b))).

[118] *See* Edelman, *supra* note 6, at 44-45; Zubler, *supra* note 8, at 926 (noting that the federal government did provide minimal supervision of eligibility amounts, and administration of grants).

[119] *See Shapiro*, 394 U.S. at 639 (stating that while the statute does not approve a one-year requirement, it prohibits the federal government from approving state durational residency plans where they include a durational residency requirement in excess of one year). The legislative history of the Act "discloses that Congress enacted the directive to curb hardships resulting from lengthy residence requirements." *Id.*

[120] *See* 42 U.S.C. § 602(b) (1982), *amended by* 42 U.S.C. 604(c) (Supp. 1997). The section provided:

The Secretary shall approve any [state assistance] plan which fulfills the

B. *The Personal Responsibility and Work Opportunity Reform Act of 1996: Workfare as We Know it.*

On August 22, 1996, President Clinton acted on his pledge to end "welfare as we know it"[121] by signing into law the Personal Responsibility and Work Opportunity Reform Act ("PRWORA" or "Act").[122] The Act replaced the AFDC entitlement program described above[123] with block grants of federal money to be paid to the states.[124] The Act provides the states with great latitude to spend the federal money as they wish.[125] Federal contributions to state family assistance programs are now governed under the Temporary Assistance for Needy Families ("TANF") program.[126] Under TANF, federal contributions to state plans are capped

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conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

Id.; see also Shapiro, 394 U.S. at 639 (stating congressional intent was to "curb hardships resulting from lengthy residence requirements.")

[121] Edelman, *supra* note 6, at 43 (arguing that PRWORA makes the welfare system worse than it was); *see* Lisa K. Garfinkle, *Two Generations at Risk: The Implications of Welfare Reform for Teen Parents and Their Children*, 32 WAKE FOREST L. REV. 1233, 1243 (1997) (discussing background and general provisions of PRWORA).

[122] Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[123] *See* 42 U.S.C. § 601(b) (1997) (stating "[t]his [section] shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part"); Zubler, *supra* note 8, at 927.

[124] *See* 42 U.S.C. § 603 (paying states quarterly); Zubler, *supra* note 8, at 927; *see also* April L. Cherry, *Social Contract Theory, Welfare Reform, Race, and the Male Sex Right*, 75 OR. L. REV. 1037, 1086 (1996) (noting that PRWORA substitutes a block grant program for former legal entitlement of indigent families to cash and in-kind assistance).

[125] *See* Edelman, *supra* note 6, at 49 (noting that the Act does not require the state's welfare expenditures to be in cash); Zubler, *supra* note 8, at 928 (arguing that the decentralization of welfare programs gives states "new latitude in deciding who gets how much assistance and for how long"); *cf.* Cherry, *supra* note 124, at 1086 (noting that the state program is ultimately subject to guidelines set by the federal government).

[126] *See* 42 U.S.C. § 603(a)(1)(1996). AFDC benefits are now referred to as TANF benefits in most state statutes. *See* Maldonado v. Houstoun, 177 F.R.D 311, 317 n.4 (E.D. Pa. 1997). Pennsylvania refers to family assistance that are partially funded by federal grants as "TANF benefits". Other states still refer to the benefits by their old moniker. *See* Roe v. Anderson, 966 F. Supp. 977, 979 n.4 (E.D. Cal. 1997) (pointing out that California still refers to benefits as AFDC benefits).

until 2002 at the level paid to the state in 1994 under AFDC.[127] In order for a states to be eligible for the federal block grants, they must not reduce their expenditures on welfare below eighty percent of their 1994 levels.[128]

Critics of PRWORA claim that the new statutory scheme will produce a "race to the bottom" as neighboring states adopt unattractive benefits packages to avoid becoming a "welfare magnet."[129] While there is extensive debate as to whether the "welfare magnet" hypothesis is valid,[130] the threat of states reacting to such fears provides some credence to the race to the bottom theory. Proponents of PRWORA point to durational residency requirements as a solution to such problems. They assert that by employing such requirements, a state will be able to experiment with favorable benefits packages without fear of becoming a welfare magnet.[131]

Although this philosophical debate is outside the scope of this paper, perhaps it explains the resurgence of durational residency requirements. The Act expressly provides that states "may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than twelve months."[132] Interestingly, there is no mention of *Shapiro*, or its progeny, in the legislative history

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[127] *See* 42 U.S.C. § 603(a)(1) (1996); *Maldonado*, 177 F.R.D. at 317 n.4.

[128] *See* 42 U.S.C. § 609(a)(7) (1990); *Maldonado*, 177 F.R.D. at 317 n.4.

[129] *See, e.g.*, *Devolution*, *supra* note 7, at 116-17; Edelman, *supra* note 6 at 52; Alan Ehrenhalt, *The Devil in Devolution*, GOVERNING MAG., May 1997, at 7; *cf. Maldonado*, 177 F.R.D. at 329 n.21 (asserting Supreme Court precedent that states may not use durational residency requirements to avoid becoming a welfare magnet may seem "counterintuitive on an economic level").

[130] *Compare* PAUL E. PETERSON & MARK ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990) (arguing that state governments will provide lower benefits out of fear that higher benefits would attract the poor), *and* Peterson, *supra* note 7, *with* F.H. Buckley & Margaret Brinig, *Welfare Magnets: The Race For The Top*, 5 SUP. CT. ECON. REV. 141 (1997) (arguing against welfare magnet hypothesis); *see also* Zubler, *supra* note 8, at 929-38 (arguing that decentralized welfare state actions will create externalities prompting a race to the bottom).

[131] *See generally* Zubler, *supra* note 8, at 936-38 (arguing that multi-tier durational residency requirements are the solution to the welfare magnet and race to the bottom dilemmas and that *Shapiro* "hamper[s]" welfare reform and thus should be overrruled); *see also* Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 2000 (1996) (arguing, prior to the enactment of PRWORA, that a solution to the race to the bottom is a two-tiered benefit program).

[132] 42 U.S.C. § 604(c) (Supp. 1997).

of the Act.

C. *The Durational Residency Requirement Boom*

Not surprisingly, section 604(c) has led to a proliferation of multi-tiered durational residency requirements. At least four states have enacted such durational residency requirements since the passage of PRWORA,[133] and at least two other states have implemented durational residency requirements which limit new residents' benefits to a percentage of the state standard benefits.[134] Two federal district courts have already enjoined multi-tier durational residency requirements,[135] and at least three other suits seeking injunctive relief have been filed in state and federal courts.[136] The following section reviews and critiques the manner in which courts have applied *Shapiro* and its progeny to such requirements.

IV. RECENT STATE AND FEDERAL CASES DETERMINING THE CONSTITUTIONALITY OF DURATIONAL RESIDENCY REQUIREMENTS OF WELFARE BENEFITS

A. Jones v. Milwaukee County*: Total Deprivation for a Short Period of Time*

In *Jones*,[137] the Wisconsin Supreme Court upheld a statute that imposed a sixty day durational residency requirement on "dependent" persons seeking "general relief."[138] Under the statute in question general relief included "such services, commodi-

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[133] *See* CAL. WELF. & INST. CODE § 11450.03 (West 1997); MINN. STAT. § 256J.43 (West 1997); N.J. STAT. ANN. § 44:10-46 (West 1997); 62 PA. CONS. STAT. § 432(5)(ii) (West 1997); WYO. STAT. ANN. § 42-2-107(a) (Michie 1997).

[134] *See* CONN. GEN. STAT. § 17b-112(b)(8) (1997) (limiting new residents to "ninety per cent of the benefit level for which [they] qualif[y]"); R.I. GEN. LAWS § 40-5.1-8(e) (1997) (reducing an otherwise eligible family's cash TANF benefits "by thirty percent . . . until the family has been a resident of the state for twelve . . . consecutive months").

[135] *See* Part IV.D.1, *infra* notes 166-79 and accompanying text.

[136] *See Across The U.S.A. Newswire: Rhode Island*, U.S.A. TODAY, Aug. 22, 1997 (noting the challenge to Rhode Island's durational residency requirement); Patricia Lopez, *Class-Action Suit Filed To Block New State Welfare Law*, STAR-TRIB. (Minneapolis), Oct. 16, 1997, at 1A (noting the challenge to Minnesota's multi-tier durational residency requirement); Ovetta Wiggins, *State's Welfare Law Challenged Paying New Residents Less At Issue*, STAR LEDGER, Oct. 15, 1997, at 19 (noting the challenge to New Jersey's durational residency statute).

[137] 485 N.W.2d 21 (Wis. 1992).

[138] *Id.* at 23.

ties or money as are reasonable and necessary under the circumstances to provide food, housing, clothing, fuel, light, water, medicine, medical, dental and surgical treatment."[139] The state claimed that it imposed the residency requirement to encourage new residents to join the work force.[140]

The Court acknowledged the "unsettled nature" of the degree to which a durational residency requirement must impinge upon the right to travel in order to constitute a penalty subject to strict scrutiny analysis.[141] The Court then held, rather capriciously, "that because the [sixty] day waiting period at issue here is so substantially less onerous than the one year waiting period of *Shapiro*, that it does not operate to penalize an individual's right to travel."[142] Having determined such, the court then applied traditional rational basis review.[143]

Although the court may have been correct concerning the lack of guidance as to what constitutes a penalty, its analysis is fundamentally flawed.[144] First, by focusing on the length of the residency requirement rather than the benefits that the requirement denied, the court misinterpreted one of the *Shapiro* trilogy's few clear standards regarding what constitutes a penalty.[145] The Wisconsin statute's definition of general relief provided a virtual laundry list of the "basic necessities of life."[146] It is clear that under *Shapiro* and *Maricopa*, any durational residency requirement that deprives otherwise eligible residents of the basic necessities of life solely based upon their recent entry into the state is a penalty on the right to interstate migration. Thus, absent evidence that the sixty day period was a bona fide residency requirement, the court should have held that the stat-

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[139] *Id.* Such benefits were funded with state money. *See id.*

[140] *See id.* at 25.

[141] *Id.* at 26.

[142] *Id.*

[143] *See id.* ("[W]e review the constitutionality of the statute under the traditional equal protection analysis such that the classification will fail" if it is without rationality).

[144] *But cf.* Zubler, *supra* note 8, at 907 (citing *Jones*, 485 N.W.2d at 26) (arguing that the *Jones* decision merely reflects the Court's failure to provide standards and the overall futility of the "penalty" analysis).

[145] *See* Matthew Poppe, Comment, *Defining the Scope of the Equal Protection Clause With Respect to Welfare Waiting Periods*, 61 U. CHI. L. REV. 291, 301 (1994) ("Although *Jones* is technically consistent with the *Shapiro* holding, it flies in the face of the concerns underlying *Shapiro* . . . .").

[146] *See Jones*, 485 N.W.2d at 23.

ute penalized the right to interstate migration.[147]

The Court's rational basis analysis is also arguably flawed. The court applied the traditional, deferential standard of rational basis.[148] In *Shapiro*, the Court held that the creation of classes of welfare recipients based on residents' period of residency within the state is not rationally related to the legitimate state interest of encouraging new residents to enter the work force. The *Jones* court upheld this interest and distinguished *Shapiro* on grounds that the *Shapiro* Court's standard of review was higher. Although some cases have held that the an interest that fails the compelling interest test still may pass rational basis review,[149] *Zobel*, *Hooper*, and *Soto-Lopez* imply that a less deferential standard of review is appropriate where a state creates classifications between its citizens based on duration of residency.[150]

B. Mitchell v. Steffen: *Percentage Reduction of Benefits*

The Minnesota Supreme Court struck down a state statute that reduced, but did not completely deny, welfare benefits based on an otherwise eligible needy resident's recent migration to the state.[151] Minnesota's welfare statute provided that "needy residents" who resided in Minnesota for six months or fewer were entitled to only sixty percent of "the general assistance or work readiness benefits that other . . . residents of Minnesota receive[d].[152] Thus, unlike *Shapiro* and *Jones*, the Minnesota statute did not involve a complete denial of benefits.

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[147] The state asserted that the purpose of the requirement was to encourage new residents to join the work force. The opinion does not mention whether the requirement was part of a test for bona fide residence.

[148] *See Jones*, 485 N.W.2d at 27-28. The court relied on the Supreme Court's deferential standard in *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), as the controlling standard of review. *See id.*

[149] *See Zobel*, 457 U.S. at 82-83 (Rehnquist, J. dissenting) (disputing the Court's claim that rewarding residents for past contributions is an unconstitutional interest on the grounds that the Court only ruled as such when applying strict scrutiny).

[150] *See e.g.*, Poppe, *supra* note 145, at 298 (discussing how the court in *Soto-Lopez* lessened the standard for applying strict scrutiny to include any "very important" benefit or right).

[151] *See* Mitchell v. Steffen, 504 N.W.2d 198, 199-200 (Minn. 1993). The Statute reduced general relief benefits during the first six months of a welfare recipient's residency within the state. *See id.* at 199. The statute at issue in this case is similar in structure and effect to recent statutes enacted in Rhode Island and Connecticut. *See* statutes cited *supra* note 134.

[152] *Mitchell*, 504 N.W.2d at 201.

The Court aptly cited *Maricopa* for the proposition that a statute may still penalize the right to interstate migration even if it does not completely deny a benefit.[153] The Court acknowledged that the Constitution does not require that a state provide welfare, but concluded that the Supreme Court has mandated that "when a state decides to provide welfare benefits . . . the state [must] distribute these benefits equally . . . without distinguishing between its residents on the duration of their residency."[154] The Court then applied strict scrutiny and found the state's asserted interest of conserving limited state resources to be an impermissible interest under *Shapiro*.[155]

C. Pre-PRWORA Multi-Tiered Durational Residency Requirements

1. *Brown v. Wing* and *Aumick v. Bane*: "One can as well starve in six months as in twelve."

The Supreme Court of New York, Monroe County, has analyzed multi-tier durational residency requirements under both the New York State and United States Constitutions.[156] In *Aumick*, the court examined a statutory requirement which limited Home Relief benefits to those who had resided within New York for six months or less.[157] The statute provided that for the first six months of residency in the state, one would be entitled only to the greater of eighty percent of the New York standard amount or the applicant's level of benefits in her state of prior residence.[158] The statute in *Brown* was even less generous: it eliminated the eighty percent guarantee and applied to both

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[153] *See id.* at 201; *see also* Poppe, *supra* note 145, at 78 (concluding that the Minnesota statute in *Mitchell* penalized the right of interstate travel).

[154] *Mitchell*, 504 N.W.2d. at 203.

[155] *See id.*

[156] *See* Brown v. Wing, 649 N.Y.S.2d 988 (Sup. Ct. 1994); Aumick v. Bane, 612 N.Y.S.2d 766 (Sup. Ct. 1994).

[157] *Aumick*, 612 N.Y.S.2d at 770-72. Such benefits, unlike AFDC benefits, were solely funded through state and local sources. *See id.* at 769. Home Relief benefits are intended for individuals not capable of maintaining themselves. *See id.*; *see also* N.Y. SOC. SERV. LAW §158(f) (McKinney 1992) (limiting the amount of benefits provided to applicants establishing residency within the preceding six month period).

[158] *See Aumick*, 612 N.Y.S.2d at 771-72. Prior to July 1, 1992, the length of an applicant's residency had no effect on the amount of Home Relief benefits received. *See id.* The law was amended in order to reduce the cost of public assistance. *See id.*; *see also* N.Y. SOC. SERV. LAW §158(f) (McKinney 1992).

Home Relief and AFDC benefits.[159] Thus, whereas the former statute guaranteed a level of minimum benefits, the latter did not.[160] After determining that the statutes violated New York State's Constitution,[161] both courts held that the statutes penalized the right to travel, and thus, violated the equal protection clause of the United States Constitution.[162]

The courts rejected the State's attempt to distinguish *Shapiro* on grounds that the *Shapiro* deprivation of benefits lasted for one year, stating: "[o]ne can as well starve in six months as in twelve."[163] The courts correctly found that the New York statutes, in essence, deprived newer residents of the basic necessities of life solely on the basis of their recent migration into the state.[164] Finding that the statutes penalized the right to travel in both cases, the courts applied strict scrutiny equal protection analysis and held the statutes unconstitutional.[165]

D. PRWORA Multi-Tier Benefits: Confusion Among the Ranks

1. *Roe v. Anderson* and *Green v. Anderson*

In both *Green*[166] and *Roe*,[167] a federal district court[168] and the

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[159] *Brown*, 649 N.Y.S.2d at 988; *see also* N.Y. SOC. SERV. LAW §131-a(3)(d) (McKinney 1992 & Supp. 1997-1998) (allowing a monthly supplemental home energy grant). This section was repealed, effective August 20, 1977. *See id.*.

[160] For example, the plaintiffs seeking Home Relief benefits in *Brown* had resided in Florida and Puerto Rico prior to migrating north to New York. *See Brown*, 649 N.Y.S.2d at 988. Because neither Florida nor Puerto Rico provided analogous benefits, the residents were completely denied Home Relief benefits. *See id.* at 989-90.

[161] *See Brown* 649 N.Y.S.2d at 993; *Aumick*, 612 N.Y.S.2d at 771-72. The New York State Constitution requires that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y.S. CONST. art. XVII, § 1 (McKinney 1987). *Brown* and *Aumick* both held that this provision forbids the legislature from creating "classification[s] of welfare recipients by standards other than need itself." *Brown*, 649 N.Y.S.2d at 992 (citing Tucker v. Toia, 43 N.Y.2d 1, 8 (1977)); *accord Aumick*, 612 N.Y.S.2d at 770 (citing same). In both cases, the court held the statute in question unconstitutional because the classifications created by the legislature were not need-based classifications. *See Brown*, 649 N.Y.S.2d at 993; *Aumick*, 612 N.Y.S.2d at 771.

[162] *See Brown*, 649 N.Y.S.2d at 995; *Aumick*, 612 N.Y.S.2d at 772.

[163] *Brown*, 649 N.Y.S.2d at 994.

[164] See *Brown*, 649 N.Y.S.2d at 992-93; *Aumick*, 612 N.Y.S.2d at 771.

[165] *See Brown*, 649 N.Y.S.2d at 995-96; *Aumick*, 612 N.Y.S.2d at 772-73.

[166] 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd mem.*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995).

[167] 966 F.Supp. 977 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

Ninth Circuit, respectively, preliminarily enjoined the prototypical multi-tier durational residency requirement explicitly authorized by PRWORA.[169] The cases concerned a California welfare law which provided that those residing in the state for less than twelve months would be entitled only to the lesser of the benefits offered by California or the benefits offered by their state of prior residence.[170] This statutory scheme created classifications of otherwise similarly situated residents based on the timing of their entry into the state.[171]

The *Green* court held that the statute penalized plaintiffs for their decision to migrate to California because it "limit[ed] . . . the basic necessities of life."[172] The court, citing *Maricopa*, dismissed the argument that the statutory scheme was not a penalty because it merely reduced, but did not eliminate, all AFDC benefits.[173] The court stated that the statutory scheme was "not

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[168] The same district court judge decided both cases. *See Roe*, 966 F. Supp. at 977; *Green*, 811 F. Supp. at 516. In *Green*, the court granted a preliminary injunction against enforcement of California's durational residency requirement, which had been approved by the Secretary of Health and Human Services ("HHS"). *Green*, 811 F. Supp. at 523. A Ninth Circuit three judge panel approved the decision without opinion. *See Green*, 26 F.3d 95, 95 (9th Cir. 1994). The Supreme Court granted *certiorari*, and oral arguments took place. *See* Anderson v. Green, No. 94-197, 1995 U.S. TRANS. LEXIS 76, at *13 (Oral Argument, Jan. 17, 1995). Prior to oral argument, however, the Ninth Circuit vacated the HHS approval of California's plan. *See* Beno v. Shalala, 30 F.3d 1057, 1075-76 (9th Cir. 1994) (holding that the Secretary's approval of California's multi-tiered system was arbitrary and capricious). Thus, because the plan did not and could not go into effect until the Secretary gave her approval, the Supreme Court vacated the judgment of the District Court. *See Green*, 513 U.S. 557, 559-60. After Congress passed PRWORA, California reinstated its statute in its identical form and, once again, plaintiffs brought the statute before the district court for review. *See Roe*, 966 F. Supp. at 977.

In *Roe*, the district court incorporated its *Green* analysis by reference. *See* Roe v. Anderson, 134 F.3d 1400, 1403-04 (9th Cir. 1998). Despite California's argument that the policy change signified by PRWORA rendered *Green* outdated, the Ninth Circuit held that its "prior affirmance of the district court's decision in *Green* remains viable as persuasive authority." *Id.* at 1404.

[169] *See Roe*, 134 F.3d at 1405; *Green*, 811 F. Supp. at 523.

[170] *See* CAL. WELF. & INST. CODE § 11450.03 (West 1997).

[171] For example, in *Green*, one plaintiff moved from Louisiana to California. *See Green*, 811 F. Supp. at 517. As a result of the multi-tier benefit scheme, she received only $190 per month whereas an otherwise similarly situated resident who had established residence more than one year prior would receive $624 per month. *See id.* Another plaintiff moved to California from Colorado, and received only $280 per month compared with a similarly situated resident's $504 per month payment. *See id.*

[172] *Id.* at 521.

[173] *See id.*

constitutional because it materially diminishes . . . AFDC benefits."[174] The State also argued that the statute was not a penalty because the new residents still received the same benefits that they had received in their prior state of residence.[175] Citing *Zobel*, the court held that the appropriate comparison is between older and newer bona fide residents of California, not between newer bona fide residents of California and residents of other states.[176]

The court then strictly scrutinized California's interest in creating the multi-tier system. It found that the State's sole purpose in passing the statute, to conserve limited state resources, was "laudable . . . yet unconstitutional."[177] The court also asserted that the statute would not even pass rational basis review as applied in *Zobel*, *Hooper*, and *Soto-Lopez*.[178] Because the state's only stated purpose was unconstitutional on its face, the statute "lack[ed] a rational design."[179]

2. *Maldonado v. Houstoun*: Contempt For the Penalty Analysis

In *Maldonado*,[180] a federal district court analyzed a Pennsylvania durational residency requirement that was almost identical to the enjoined statute in *Green* and *Roe*.[181] The court's analysis, however, differed from that of the California district court. The *Maldonado* court, similarly to the *Roe* court, began its analysis by tracing the recent welfare reform, discussing the right to travel, and analyzing *Shapiro* and its progeny.[182] Whereas the *Green* and *Roe* court did not appear to experience

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[174] *Id.*

[175] *See id.*

[176] *See id.* In addition, the Court dismissed this argument because even the comparison between the newer residents and residents of their former state generally fails once the cost of living is adjusted for their new abode. *See id.; cf.* Anderson v. Green, No. 94-197, 1995 U.S. TRANS. LEXIS 76, at *13 (Oral Argument, Jan. 17, 1995) (questioning State's argument because of the State's failure to take increased cost of living into effect).

[177] *Green*, 811 F. Supp. at 522.

[178] *See id.* (stating that there has never been a Supreme Court decision upholding a durational residency requirement where the sole interest was to conserve state resources).

[179] *Id.* at 523.

[180] 177 F.R.D. 311 (E.D. Pa. 1997).

[181] *Compare* CAL. WELF. & INST. CODE § 11450.03 (West 1994), *with* 62 PA. CONS. STAT. § 432(5)(ii) (West 1997).

[182] *Compare Maldonado*, 177 F.R.D. at 311-17, 323-28, *with Roe*, 966 F. Supp. at 977.

discomfort in applying *Shapiro* and its progeny,[183] the *Maldonado* court repeatedly criticized the Supreme Court's right to travel jurisprudence as "unsettled" and "fractured."[184] The court proceeded to determine that Pennsylvania's durational residency requirement did not penalize the constitutional right to interstate travel.[185] The court reasoned that although the newer resident's TANF benefits were reduced to a level below the standard amount, they still received other forms of benefits.[186] Thus, the court held that the multi-tier system did not deprive the residents of the basic necessities of life.[187] This determination is both inconsistent with *Shapiro* and with the facts of the case. The *Maldonado* court somehow determined that non-cash payments of food stamps, medical assistance, and job-search assistance militated against the finding of a penalty in spite of the fact that the plaintiff's monthly benefits did not even exceed their monthly rent.[188] The court also reasoned that the plaintiff's right to travel was not penalized because she received no less benefits then she did before she moved to Pennsylvania.[189] The *Green* court correctly rejected this argument on two grounds: (1) if the increase in cost of living is accounted for, plaintiff's benefits actually decrease;[190] and (2) the appropriate comparison in a right to travel equal protection case is between the new resident and older residents of the state imposing the requirement.[191] The *Maldonado* court's final justification for failing to find a penalty is that "the Supreme Court has subtly moved away from applying the penalty analysis in cases where there has been no pen-

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[183] *See, e.g.*, *Green*, 811 F. Supp. at 521 ("In light of [*Shapiro* and its progeny] . . . discussed above, [California's] durational residency requirement . . . must be invalid.").

[184] *Maldonado*, 177 F.R.D. at 323 ("[T]his [c]ourt cannot await a clarifying decision by the Supreme Court but rather this [c]ourt must attempt to apply this fractured area of law to the facts of this case.").

[185] *See id.* at 330.

[186] *See id.* at 331 (citing resident's receipt of benefits such as food stamps, medical benefits, and assistance in finding employment).

[187] *See id.* at 331-32.

[188] *Id.* at 317. The plaintiffs received only $304 per month which did not meet their $350 per month rent, compared to $836 per month received by similarly situated families who had resided in Pennsylvania for more than one year. *See id.*

[189] *See id.* at 331.

[190] *Green*, 811 F. Supp. at 521.

[191] *See id.* at 522 (citing Zobel v. Williams, 457 U.S. 55, 65 (1982); *see also* Roe v. Anderson, 134 F.3d 1400, 1405 (9th Cir. 1998) (affirming the use of such a standard).

alty in the traditional sense."[192]

The *Maldonado* court did not mask its contempt for the penalty analysis. It asserted that "the 'penalty' that is allegedly imposed in these cases is a mere legal fiction."[193] Although the *Maldonado* court purported to apply *Shapiro* to the facts of this case, it seems that the court's disdain for the penalty analysis drives its holding. Although the Supreme Court has arguably limited its penalty analysis to durational residency requirements that burden the basic necessities of life or a fundamental right, there is no indication that the Court will abdicate the penalty analysis entirely.[194] In the instant case, Pennsylvania's durational residency requirement clearly deprives the plaintiff of the basic necessities of life.[195] The *Maldonado* court should have found that this deprivation equated to Pennsylvania imposing a penalty on the plaintiff for exercising her right to interstate migration.

The *Maldonado* court, however, did not differ from *Green* in all respects. Both courts held that the multi-tier benefit schemes fail to pass the Supreme Court's heightened rational basis review.[196] Pennsylvania's first asserted interest was to discourage indigent migration into the state.[197] Here, the court correctly relied on *Shapiro* and held that the "welfare magnet" rationale is constitutionally impermissible.[198] Pennsylvania also asserted that it erected the multi-tier scheme in order to encourage new residents to join its work force.[199] The court again relied on *Shapiro* and held that the multi-tier durational residency

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[192] *Maldonado*, 177 F.R.D. at 331-32.

[193] *Id.* at 331 n.25; *see also* Zubler, *supra* note 8, at 897-98 (discussing traditional penalties such as "a lost benefit . . . a person would have received had she not exercised some constitutional right").

[194] *See e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (refusing to extend strict scrutiny of equal protection to a broad range of basic necessities, including education). In *Shapiro*, Justice Harlan dissented on the grounds that scrict scrutiny might thereafter be applied frequently to any law relating to necessities so as to "swallow the standard equal protection rule." Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting). In light of cases such as *Rodriquez*, Justice Harlan's concerns should be reduced.

[195] *See Maldonado*, 177 F.R.D. at 317. The plaintiffs in *Maldonado* contended that the multi-tier durational residency requirement deprived them of "basic necessities such as shelter, winter heat, clothing, and food." *Id.*

[196] *See Green*, 811 F. Supp. at 522-23; *Maldonado*, 177 F.R.D. at 328.

[197] *See Maldonado*, 1997 U.S. Dist. LEXIS 15474, at *57.

[198] *See id.* at 329 (citing *Shapiro*, 394 U.S. at 629).

[199] *See id.* at 328.

scheme was not rationally related to this admittedly legitimate interest.[200]

CONCLUSION

Although the Supreme Court's jurisprudence regarding the right to travel has been somewhat unsettled, its decision in *Shapiro* still stands. The Constitution does not permit a state to deny an otherwise eligible welfare recipient the basic necessities of life as a penalty for exercising her fundamental right to interstate migration. The PRWORA has induced states into creating such constitutionally impermissible penalties by providing legislative permission for multi-tier durational residency requirements. When such durational residency requirements reach the Supreme Court for review, the Court should apply the principles of the *Shapiro* trilogy and strike down these invidious classifications.

David A. Donahue[*]

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[200] *See id.*

[*] The author would like to thank his parents for their support, Professor Rosemary Salomone for her guidance, and the law review staff for their hard work on this Note.